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No. 99-89

In the

Supreme Court of the United States

ROBERT BOGAN AND SCOTT BOGAN
Petitioners,

v.

AUSTIN E. HODGKINS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF CONNECTICUT, IOWA, MICHIGAN, NEVADA, NEW YORK, UTAH, VERMONT AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The States of New York, Nevada, Connecticut, Iowa, Michigan, Utah, Vermont and the District of Columbia respectfully submit this brief as amici curiae in support of petitioners' request that a writ of *certiorari* be issued to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered February 2, 1999. Pet. App. 1a. The decision for which certiorari is sought conflicts with this Court's decisions and the decisions of other circuits in its construction of *per se* rules under section 1 of the Sherman Act, 15 U.S.C. § 1.

INTEREST OF THE AMICI CURIAE

The amici states, which include each of the states in the Second Circuit, have a vital interest in the antitrust laws and in preserving *per se* treatment of horizontal restraints of trade. The Attorneys General are the chief law officers of the amici states and are charged with the responsibility of enforcing the antitrust laws in their respective states. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states. The Attorneys General also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief and are the primary public enforcers of state antitrust laws, which are often interpreted in conformity with federal law. The states play a major role in antitrust enforcement and have a substantial interest in ensuring that the antitrust laws are interpreted in harmony with antitrust policy and this Court's decisions.

SUMMARY OF ARGUMENT

The Second Circuit erroneously held that a horizontal agreement among independent economic actors on how they will compete in providing a product or service to the public is not *per se* illegal. The challenged restraint should have been declared *per se* illegal. The *per se* rule applies to "intrabrand" restraints among horizontal competitors. A *per*

se claim does ***not*** require proof of market power. The harmful effect of an agreement to not compete for subagents merits *per se* treatment because the harmful effect ***is*** "clearly apparent." Pet. App. 12a.

The Court of Appeals found that neither the *per se* rule nor the abbreviated or "quick look" rule of reason analysis applied to the horizontal restraint. *Id.* The Court of Appeals substantially restricted the scope of the *per se* rule, and if left uncorrected, that construction will pose a threat to proper enforcement of the antitrust laws. Alternatively, the Court of Appeals' cursory disregard for the application of the "quick look" analysis directly contradicts this Court's recent decision in *California Dental Association v. Federal Trade Commission*, _ U.S. _, 119 S. Ct. 1604 (1999).

Therefore, the amici states request that the Court grant *certiorari* and summarily reverse so as to reaffirm that the *per se* rule applies to horizontal allocation agreements. In the alternative, the amici states request that the Court vacate and remand in light of this Court's opinion in *California Dental.*

ARGUMENT

I. THE COURT OF APPEALS' EMASCULATION OF THE *PER SE* RULE SHOULD BE SUMMARILY REVERSED

Petitioners are a district agent and a sales agent who were terminated by one of the six independent general agents in the New York City metropolitan area for Northwestern Mutual Life Insurance Co. The six general agents compete in the New York City metropolitan region and allegedly agreed among themselves not to recruit or hire each others' existing district or sales agents (collectively "subagents") without the consent of the subagent's general agent (the "agreement"). Petitioners, plaintiffs below, alleged that they were harmed

because of the enforcement of the agreement by respondent, petitioners' general agent.

The nature of the restraint at issue in the decision below cannot be dismissed as a factual dispute. The court below reviewed a grant of summary judgment to defendants, and thus resolved all ambiguities and potential factual inferences in plaintiffs' favor. One of the ambiguities resolved in plaintiffs' favor as a result of the case's procedural context was the parties' dispute as to whether the agreement was horizontal or vertical. The court analyzed the challenged agreement as a horizontal restraint. Pet. App. 10a.

After characterizing the agreement as horizontal, the court turned to what framework applied. First, the court held that an agreement among directly competing general agents on how they would treat subagents was a "transfer restriction policy" or a "no-switching" agreement, which it held was never *per se* illegal. Pet. App. 15a. Next, the court considered the agreement subject to a rule of reason analysis because it was an "intrafirm" agreement among general agents of one company, instead of an "interfirm" agreement among general agents of different companies. Pet. App. 14a. Finally, the court held that a horizontal agreement among direct competitors to not compete for subagents does not merit *per se* treatment because the harmful effect is "not clearly apparent." Pet. App. 15a.

The Court of Appeals made three distinct errors in analyzing how and whether the *per se* rule applies to the agreement. Each erroneous decision led the Court of Appeals toward a further error until it held that the *per se* rule requires proof of the very elements that the rule was meant to avoid.

First, the Court of Appeals in a single paragraph summarily rejected applying all *per se* theories, except "group boycotts," to the agreement. Pet. App. 13a. The court's facile rejection of that characterization was as follows:

> The [petitioners] suggest that the Agreement may be a supplier allocation, but the facts do not bear this interpretation; the Agreement permits transfers, and experienced NML agents do not comprise the entire set of suppliers of their services. Thus, while the Agreement may constrain General Agents to some degree, it does not allocate the market for agents to any meaningful degree.

Id.

The court below failed to construe that the agreement was a restraint among direct competitors about how those competitors would treat a key input in their industry: the experienced subagents they used. The agreement among general agents prevented transfers of experienced subagents among themselves. Thus, at a minimum the general agents agreed not to compete for subagents and to allocate those subagents to whichever general agent currently used the subagents.

Such a horizontal allocation agreement is a naked restraint to which the *per se* rule applies. *Palmer v. BRG, Inc.*, 498 U.S. 46 (1990) (per curiam). Such a restraint need not eliminate all competition to be *per se* illegal. As phrased by this Court in *Palmer*:

> The Court of Appeals erred when [it] assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them. . . . [A]greements are anticompetitive regardless of whether the parties split a market with which both do business or whether they merely reserve one market for one and another for the other.

Id. at 49-50.

The other Courts of Appeals appropriately apply the *per se* rule to this type of restraint. *Hammes v. AAMCO Transmission, Inc.*, 33 F.3d 774, 782-83 (7th Cir. 1994) (customer allocation agreement among franchisees is *per se* illegal); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (horizontal customer allocation *per se* illegal); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990) (horizontal customer allocation agreement); *United States v. Cooperative Theatres*, 845 F.2d 1367, 1373 (6th Cir. 1988) (customer allocation scheme); *Service Merchandise Co. v. Boyd Corp.*, 722 F.2d 945, 950 (1st Cir. 1983) (horizontal concerted refusal to deal); *Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292, 300 (5th Cir.) (horizontal market division), *cert. denied*, 439 U.S. 966 (1978); *American Motor Inns v. Holiday Inns*, 521 F.2d 1230, 1242 (3d Cir. 1975) (horizontal territorial allocation). Labelling a horizontal allocation agreement a "no-switching" agreement, Pet. App. 15a, does not transform a *per se* case into a rule of reason case. *United States v. Capitol Serv.*, 756 F.2d 502 (7th Cir.) (motion picture "split" agreement among horizontal competitors is *per se* illegal), *cert. denied*, 474 U.S. 945 (1985).

The second error of the Court of Appeals was to hold that the agreement was an "*intra*firm" agreement to which the rule of reason applied. The court held that the agreement among the general agents was "far from" the ambit of *per se* analysis because it is "akin to an *intra*firm agreement, one between general agents of the same company to restrain trade only in experienced [subagents] of that company." Pet. App. 14a.

This holding confuses analysis of horizontal and vertical restraints and is inconsistent with controlling precedent of this Court. For example, in *United States v. Topco Associates*, 405 U.S. 596 (1972), this Court reviewed a determination by a district court that refused to apply the *per se* rule to territorial and customer restrictions among horizontal competitors of the Topco brand. The district court reasoned

that territorial and customer restrictions, although eliminating intrabrand competition in Topco products, were reasonable because they promoted and enhanced interbrand competition with national supermarket chains. *United States v. Topco Associates*, 319 F. Supp. 1031,1038 (N.D. Ill. 1970), *rev'd* 405 U.S. 596 (1972). This Court rejected applying the rule of reason, recognizing that "[o]ne of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." 405 U.S. at 608.

Indeed, many leading cases from this Court in this area concern "*intra*firm" restraints. An agreement among the distributors of General Motors cars was held to be a *per se* illegal restraint, even though the distributors restrained only *intra*brand competition, that is competition for General Motors cars. *United States v. General Motors Corp.*, 384 U.S. 127 (1966). Similarly, this Court applied the *per se* rule to restraints among the companies that manufacture Sealy brand mattresses, *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), which is what the Second Circuit labelled an "*intra*firm" restraint to which only the rule of reason applied.

Furthermore, by denying *per se* treatment unless a harmful effect upon competition can be shown, the Court of Appeals wrongfully added another element of proof to a *per se* analysis. Under the *per se* rule, restraints on competition are presumed unreasonable without inquiry into anticompetitive effects. *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958). As explained by Professor Areeda, "In fullest flower, a per se rule condemns conduct without proof of power, effect, or purpose and without hearing claims of legitimate objectives." 7 P. Areeda, Antitrust Law ¶ 1509, at 409 (1986). To require such proof as the Court of Appeals did here would eliminate the very benefits of a *per se* rule.

Most importantly, the Court of Appeals concluded that "it is an element of a *per se* case to describe the relevant market" (citing monopolization cases to support its view). Pet. App. 14a. It is clear, however, that under a *per se* analysis one need not define "a market, [show] market shares, or [indicate] any actual or likely impact." 7 P. Areeda, Antitrust Law ¶ 1515a, at 415 (1986).

Thus, the Court of Appeals held that to obtain *per se* treatment for a horizontal agreement among competitors, to restrict competition for a necessary input (experienced subagents), which agreement the court characterized as a group boycott, the plaintiff must first prove a relevant market and harmful competitive effects. Such an erroneous construction of the *per se* rule undercuts its usefulness and "is flatly inconsistent with the clear course of our antitrust jurisprudence." *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 (1990) (holding boycotts *per se* unlawful without need to prove market power). Accordingly, we urge the Court to grant certiorari and summarily reverse the Court of Appeals' holding on this point.

II. THE COURT OF APPEALS' SUMMARY DISMISSAL OF THE "QUICK LOOK" OR ABBREVIATED RULE OF REASON WAS INCORRECT

For the reasons explained above, the amici states believe that the *per se* rule applies to the agreement discussed by the Second Circuit. Even if this Court finds that the court below appropriately held that the *per se* rule did not apply, however, something less than a full-blown rule of reason analysis was appropriate.

The Court of Appeals, prior to dismissing application of the *per se* rule, also dismissed application of the "quick look" rule in a footnote. Pet. App. 12a. The Court of Appeals held that because respondent "countered [with] sound allegations"

of a procompetitive rationale to petitioners' allegations of a naked restraint of trade, the analysis should proceed directly to the rule of reason. *Id.*

Although a "quick look" analysis can "be applied in the twinkling of an eye," the Court of Appeals should have at least blinked. *NCAA v. Bd. of Regents,* 468 U.S. 85, 109 n.39 (1984) (*quoting* P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981)). Furthermore, in light of this Court's recent decision in *California Dental*, the Court of Appeals should have inquired into the logic of the agreement and into respondent's alleged procompetitive justification to determine whether on the whole the primary tendency of the agreement was anticompetitive. _ U.S. at _, 119 S. Ct. at 1613.

The agreement at issue in this case is a naked restraint on price and output. By agreeing not to compete for experienced subagents, the general agents restricted all forms of competition for such subagents. Having identified a horizontal restraint and having decided that such activity did not meet the criterion for the *per se* rule, the Court of Appeals next determined that respondent's unspecified "sound allegations" of procompetitive justification required rule of reason analysis. Pet. App. 12a. Yet, the agreement prevented subagents from offering better services to their customers by transferring or threatening to transfer to another general agent. Moreover, the agreement enabled general agents to restrict the educational and business opportunities of subagents. Once with a general agent, subagents have little choice but to remain with that general agent. Indeed, under the agreement, general agents would likely have little incentive to provide an experienced subagent anything beyond the basic compensation package provided to a new subagent.

In *California Dental*, this Court concluded that where a horizontal restraint "fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious"

a "more extended examination of the factual underpinnings" is required, without necessarily embarking on full-blown rule of reason analysis. _ U.S. at _, 119 S. Ct. at 1613. Here, the Court of Appeals stated that the anticompetitive effects of the agreement were not obvious. Pet. App 15a. But the Court of Appeals then concluded, without further analysis, that because respondent alleged a competitive justification, the case must proceed to a full blown rule of reason or be dismissed. Pet. App. 12a. The Court of Appeals erred in holding that mere "allegations" are sufficient to end the inquiry. To be consistent with this Court's decision in *California Dental*, the Court of Appeals' analysis "required a more extended examination of the possible factual underpinnings" without the necessity for the fullest market analysis. _ U.S. at _, 119 S. Ct. at 1617. The Court of Appeals should have scrutinized the circumstances, details, and logic of both the restraint and respondent's justification for the restraint to determine with confidence whether, on the whole, the "principal tendency of [the restriction]" was anticompetitive. *Id.* Having failed to do so, the Court of Appeals' judgment should be vacated and remanded for fuller consideration of the issue in light of *California Dental*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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